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No. 00-507

In the Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), exempts Indian Tribes from the wagering excise and occupational taxes imposed by Sections 4401 and 4411 of the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals in *Chickasaw Nation* v. *United States* (Pet. App. 1a-28a) is reported at 208 F.3d 871. The order of the court of appeals in *Choctaw Nation* v. *United States* (Pet. App. 29a-32a) is unpublished, but the decision is noted at 210 F.3d 389 (Table). The opinions of the district court in *Chickasaw Nation* v. *United States* (Pet. App. 47a-65a) and *Choctaw Nation* v. *United States* (Pet. App. 33a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals in each case was entered on April 5, 2000. Petitions for rehearing were denied on July 5, 2000. Pet. App. 66a-67a. The petition for a writ of certiorari was filed on October 3, 2000, and granted on January 22, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 20(d) of the Indian Gaming Regulatory Act. 25 U.S.C. 2719(d), and Sections 4401, 4402, 4411 and 4421 of the Internal Revenue Code of 1986, 26 U.S.C. 4401, 4402, 4411 and 4421, are set forth at Pet. App. 90a-98a. Relevant portions of Section 7871 of the Code are set forth at App., *infra*, 1a-4a.

STATEMENT

1. Section 4401(a) of the Internal Revenue Code of 1986 (I.R.C. or the Code) imposes an excise tax on all wagers. Section 4411 imposes an occupational tax on each person liable for the wagering excise tax. (We sometimes refer to these taxes jointly as the "wagering excise taxes.") The term "wager" includes any lottery. I.R.C. § 4421(1). Section 4402(3) grants an exemption from the wagering excise taxes for state-conducted lotteries, but that exemption does not apply, by its terms, to tribal lotteries. Section 7871(a)(2) of the Code provides that Tribes are to be treated as States for purposes of exemption from a number of federal excise taxes (so long as the transaction at issue involves the exercise of an essential government function), but the taxes specified do not include the wagering excise taxes.

The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. 2701 *et seq.*),

provides a federal regulatory framework for tribal gaming operations. Section 20(d) of the IGRA, 25 U.S.C. 2719(d), provides in part:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations * * * in the same manner as such provisions apply to State gaming and wagering operations.

Chapter 35 of the Internal Revenue Code includes Sections 4401-4424 of the Code.

2. Petitioners are federally recognized Indian Tribes that operate gaming activities, including the sale of "pull-tabs." Pet. App. 2a, 30a. In a pull-tab game, a player buys a card and then peels back tabs on the card to reveal hidden symbols, which determine whether the card may be exchanged for a cash prize. *Ibid.*; see Choctaw C.A. App. CH.0152. The cards are manufactured in sets of 24,000, and each set has a predetermined number of winners. Pet. App. 3a, 31a. Pull-tab games are "lotteries" for purposes of the federal wagering excise taxes. Rev. Rul. 57-258, 1957-1 C.B. 418.

The Internal Revenue Service audited petitioners and issued assessments for unpaid wagering and occupational taxes with respect to various periods from 1988 to 1994. Petitioners paid a portion of the taxes assessed and then filed suits in federal district court seeking refunds of the taxes paid. The United States counterclaimed in each case for the unpaid portion of the assessments. Pet. App. 34a, 47a-48a.

The district court rejected petitioners' refund claims and granted summary judgment for the government in each case. Pet. App. 33a-46a, 47a-65a. As relevant here, the court in each case rejected the argument advanced by petitioners that imposition of the excise taxes was inconsistent with the IGRA. *Id.* at 41a-44a, 64a.[1]

3. The court of appeals affirmed in each case. Pet. App. 1a-28a, 29a-32a. In its opinion in the Chickasaw Nation case, the court addressed and rejected the argument that IGRA § 20(d)'s parenthetical reference to Chapter 35 of the Internal Revenue Code extends to Tribes the wagering tax exemption afforded to state lotteries under I.R.C. § 4402(3). Pet. App. 19a-26a. The court considered it "clear that [25 U.S.C.] § 2719(d) does not expressly prohibit the imposition of federal wagering excise or federal occupational taxes on Indian gaming activities." *Id.* at 22a. Rather, Section 2719(d) (IGRA § 20(d)) "provides only * * * that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed a certain level." Pet. App. 22a.

The court of appeals observed that in the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202(a), 96 Stat. 2608, Congress added to the

[1] Petitioner Choctaw Nation argued generally that imposition of the excise taxes was inconsistent with the IGRA, but it "[did] not argue that § 2719(d) (IGRA § 20(d)) provides an excise tax exemption for Indian gaming activities," and the district court accordingly "[did] not address" that issue in the Choctaw case. Pet. App. 43a-44a. The magistrate judge's decision in the Chickasaw Nation case did address that argument, and rejected it. *Id.* at 64a.

Internal Revenue Code a new Section 7871, which "granted tribes some of the tax advantages enjoyed by states," and in particular "extended to tribes many, but not all, of the federal excise tax exemptions typically enjoyed by the states." Pet. App. 23a. "Among the federal excise tax exemptions enjoyed by the states but not granted to tribes * * * was the exemption found in the IRC for 'State-conducted lotteries.'" *Ibid.* That situation, the court explained, provided the backdrop for Congress's consideration of the IGRA. During that consideration, the original version of the provision that became Section 2719(d) would have expressly granted an exemption of the sort sought by petitioners. That language, however, was deleted before the statute was enacted. *Id.* at 23a-24a.

The court found unpersuasive petitioners' reliance on a letter from Senator Daniel Inouye to the Commissioner of Internal Revenue, in which the Senator "suggest[ed] that by specifically referring to Chapter 35 in § 2719(d), 'it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35.'" Pet. App. 25a; see *id.* at 112a-114a (reprinting letter). The court noted that "the comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting the statute," and that in any event the proffered interpretation was "inconsistent with both the language and the legislative history of the statute." *Id.* at 25a. The court concluded:

> Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of

taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definitions of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Id. at 25a-26a.[2]

The court of appeals also affirmed the grant of summary judgment for the government in the Choctaw case, characterizing the issues on appeal in that case as "identical" to those at issue in the Chickasaw case, and relying on its opinion in the latter case. Pet. App. 29a-32a.

SUMMARY OF ARGUMENT

Petitioners do not contest that the federal wagering excise taxes apply by their terms to tribal gaming operations. Nor does any provision of the Internal

[2] The court of appeals also considered and rejected petitioner Chickasaw Nation's arguments that the purchase of a pull-tab card is not a "wager" subject to the federal excise tax (Pet. App. 5a-12a), that the Nation is not a "person" subject to the federal wagering taxes (*id.* at 12a-18a), and that an 1855 treaty between the Nation and the United States exempts it from those taxes (*id.* at 26a-28a). Those holdings are not at issue in this Court. See Pet. i.

Revenue Code, including the provision that exempts state lotteries from the wagering excise taxes and the provision that exempts Tribes from various other excise taxes, provide an exemption here. Petitioners therefore argue instead that Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), creates an exemption from the federal wagering taxes in favor of petitioners and other Tribes. That is not a reasonable construction of the IGRA.

The operative language of Section 2719(d) directs that all provisions of the Code "concerning the *reporting and withholding* of taxes with respect to * * * [a player's] *winnings*" are to apply to Tribes as they would to States. (Emphasis added.) That language cannot plausibly be read to refer to Code provisions concerning the *imposition* of excise taxes on a game operator's own *receipts* or *employment*. Petitioners' argument accordingly rests, not on the statute's operative language, but on its parenthetical listing of illustrative examples: "(including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code)." In particular, petitioners rely on the reference to Chapter 35 of the Code, which imposes the federal wagering taxes, and includes an exemption from those taxes for state lotteries.

We agree with the court of appeals that Section 2719(d)'s reference to Code Chapter 35, as an example of the scope of the IGRA provision, is "somewhat cryptic," because that Chapter bears no obvious relation to the reporting and withholding of taxes on wagering winnings. Whatever meaning might plausibly be given to that reference, however, or even if it simply cannot be harmonized with the statute's operative text, it does not create a federal tax exemption. The reference is merely one of a series of unexplained cross-

references in an illustrative parenthetical. It cannot fairly be said to contradict limitations that inhere in the provision's central textual command. That is particularly true where the result that petitioners seek is a complete exemption from two federal excise taxes that are wholly unrelated to the reporting and withholding provisions to which Section 2719(d) otherwise refers.

The history of the IGRA confirms that conclusion. As originally proposed, the bill that became the IGRA included language that would indeed have extended to Tribes the state-lottery exemption to the wagering excise taxes. That language, however, was deleted from the bill, by the same committee that added the parenthetical illustrations at issue here. Deletion of the express exemption language is strong evidence of an intention not to create an exemption; and there is nothing to suggest that the new parenthetical language was intended to provide Tribes with a shorthand version of the express exemption that the drafters had just considered and deleted.

Finally, the purposes of the IGRA do not justify an inference of congressional intent to extend to Tribes the excise tax exemption granted to state lotteries. Although the goal of fostering tribal economic development and self-sufficiency is surely important, Congress can advance that goal without exempting Tribes from all federal taxes, or always treating Tribes in the same way that it treats States. The Internal Revenue Code expressly accords Tribes the benefit of some of the excise tax exemptions enjoyed by States. That provision does not, however, extend to the wagering excise taxes; and the express exemption from those taxes for state lotteries does not, by its terms, apply to Tribes. Against that background, the IGRA cannot plausibly be read to pursue general policies of tribal development by

conferring a federal tax exemption through a "cryptic" cross-reference in an illustrative parenthetical.

Petitioners scarcely contest that these traditional tools of statutory construction—text, history, purpose and context—do not support their quest for an exemption. Instead, they rely almost exclusively on the proposition that "ambiguity in an Indian-law-related federal statute is to be liberally construed in favor of tribal interests." Pet. Br. 12 (capitalization and emphasis omitted). If Section 2719(d) were genuinely susceptible of the construction that petitioners seek to place on it, it might be appropriate for the Court to take that principle into account—although even if it applied, it would not simply dictate resolution of the case in petitioners' favor, because the Court would also have to take into account the countervailing and similarly venerable principle that exemptions from federal taxation may not be inferred, but must be expressly stated. This case, however, does not resolve itself into a duel between competing canons of construction. Such canons are properly applied only after, or at least alongside, the central tools of statutory interpretation, and to resolve interpretive ambiguity, not to create it. In this case, those basic tools make clear that Section 2719(d) cannot be construed to extend the state-lottery tax exemption to tribal gaming.

ARGUMENT

SECTION 20(D) OF THE INDIAN GAMING REGULATORY ACT CANNOT PROPERLY BE CONSTRUED TO EXEMPT TRIBAL GAMING OPERATIONS FROM THE FEDERAL WAGERING EXCISE TAXES

Section 4401 of the Internal Revenue Code imposes an excise tax, in this case equal to .25% of every amount wagered, on "[e]ach person who is engaged in the busi-

ness of accepting wagers" or "who conducts any wagering pool or lottery." 26 U.S.C. 4401(a) and (c). Section 4411 of the Code imposes an occupational tax, in this case equal to $50 per person, on "each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 26 U.S.C. 4411(a). Petitioners do not contest in this Court that each of these taxes applies, on its face, to a wagering or lottery business conducted by an Indian Tribe, and in particular to the sale of pull-tab cards by petitioners. The question presented is whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), nonetheless creates an exemption from these taxes in favor of petitioners and other Tribes.[3]

The federal wagering taxes also apply on their face to lotteries or wagering businesses conducted by States.

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[3] This case deals with excise taxes, not income taxes. Compare Rev. Rul. 67-284, 1967-2 C.B. 55, 58 (concluding that Indian Tribes are not taxable entities for purposes of the federal *income* tax); see also Pet. App. 12a-18a; S. Rep. No. 646, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. No. 984, 97th Cong., 2d Sess. 15 (1982). Amici Seminole Tribe of Florida *et al.* argue (Br. 9-10) that Section 4401 does not apply to wagers placed with Tribes because tribal gaming is authorized by federal, not state, law, and amici San Manuel Band (*passim*) and San Carlos Apache Tribe (Br. 7-8) argue that the federal taxes do not apply because tribal gaming businesses are operated to support governmental functions, not for private profit. Neither of those arguments is germane to the question presented in this case. See Pet. i. In any event, the state-authorization argument fails for reasons set out by the Federal Circuit in *Little Six, Inc.* v. *United States*, 210 F.3d 1361, 1363-1364 (2000), petition for cert. pending, No. 00-1115 (filed Jan. 10, 2001) (see Pet. App. 104a-106a), and it suffices to observe that the "profit" argument would render superfluous the express tax exemption granted to state lotteries by Section 4402(3) of the Code—the very provision on which petitioners seek to rely.

Section 4402 of the Code, however, expressly exempts from taxation any wager placed with a state agency or agent "in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law." 26 U.S.C. 4402(3). Section 7871 of the Code in turn provides that, in transactions involving its "essential governmental function[s]," "[a]n Indian tribal government shall be treated as a State" for various specified federal tax purposes, including "for purposes of any exemption from * * * an excise tax imposed by" Chapters 31-33 and 36 of the Code (relating generally to special fuels, certain manufactured goods, communications services, and use of certain highway vehicles). 26 U.S.C. 7871(a)-(b). Section 7871 does not, however, apply to the federal wagering excise taxes, which are imposed by Chapter 35 of the Code (Sections 4401-4424). The Code itself does not, therefore, provide Tribes, as opposed to States, with any exemption from those taxes.

Petitioners accordingly rely instead on the IGRA, which Congress enacted in 1988 in order, among other purposes, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Near the end of that Act, in a Section that otherwise deals with the Act's application to certain lands acquired in trust for Tribes after the Act's effective date, Congress provided that:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall

> apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) [25 U.S.C. 2710(d)(3)] that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

IGRA § 20(d)(1), 102 Stat. 2486 (25 U.S.C. 2719(d)(1)). Petitioners argue that the IGRA's parenthetical reference to Chapter 35 of the Code confers on Tribes the same exemption from the tax imposed by Section 4401 of the Code that is extended to States by Section 4402. See *Little Six, Inc.* v. *United States*, 210 F.3d 1361 (Fed. Cir. 2000) (adopting that view), petition for cert. pending, No. 00-1115 (filed Jan. 16, 2001). That is not, however, a reasonable construction of Section 2719(d).

A. The Language Of The IGRA Does Not Exempt Tribes From The Wagering Excise Taxes

The operative language of 25 U.S.C. 2719(d) (IGRA § 20(d)) directs that all provisions of the Internal Revenue Code "concerning the reporting and withholding of taxes with respect to * * * winnings" are to apply to Tribes as they would to States. That language ensures that tribal gaming operations, like state operations, are required to report, withhold, and pay over to the IRS a specified percentage of any player's winnings over a certain amount, or of a nonresident alien player's winnings from certain games. See, *e.g.*, 26 U.S.C. 871(a)(1) and (j) (imposing tax on nonresident aliens), 1441(a) and (c)(11) (withholding of tax imposed on nonresident aliens), 3402(q) (withholding of tax on winnings above certain threshold amounts), 6011(a) (requirement to make return where tax has been withheld), 6041(a) (information returns with respect to

payments of $600 or more). It forecloses, for example, any argument, similar to one made by petitioners in the lower courts in this case (see Pet. App. 12a-18a), that a Tribe is not a "person" subject to those requirements. See, *e.g.*, 26 U.S.C. 3402(q)(1) (requiring withholding by "[e]very person, including * * * a State, * * * making any payment of winnings"). It also extends to Tribes any special rules applicable to States with respect to reporting or withholding of taxes on winnings, such as the higher amount that was necessary to trigger the withholding requirement under Section 3402(q) at the time that the IGRA was enacted.[4] Section 2719(d)'s language addressing "the *reporting and withholding* of taxes with respect to * * * [a player's] *winnings*" cannot, however, plausibly be read to extend to Code provisions concerning the *imposition* of excise taxes on a game operator's *receipts* or *employment*.

Petitioners' contrary argument rests, not on the operative language of Section 2719(d), but on the provision's parenthetical listing of illustrative examples: "(including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such [Code])." Of the Sections listed in the parenthetical, Sections 1441, 3402(q), and 6041 are, as just noted, straightforward examples of "provisions * * * concerning the reporting and withholding of taxes" on winnings: Section 1441 deals with withholding tax from the income of nonresident aliens, Section 3402(q) with withholding from winnings

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[4] Under 26 U.S.C. 3402(q)(3) (1988), withholding generally applied to wagering or lottery proceeds greater than $1000, although in some cases only if the proceeds were at least 300 times the amount wagered. A state lottery was required to withhold, however, only when winnings exceeded $5000. In 1992 the withholding threshold was raised to $5000 for all types of proceeds. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1942(a), 106 Stat. 3036.

exceeding certain threshold amounts, and Section 6041 with the filing of information returns by businesses with respect to payments of certain amounts, including certain gambling winnings, that may be taxable income in the hands of the recipient. Section 6050I requires every person who conducts a business to report any receipt of more than $10,000 in cash in a single transaction or group of related transactions. Cf. *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (involving prosecution under related provisions of Title 31). Chapter 35 of the Code, as also noted above, imposes the federal excise and occupational taxes on gaming operations and operators (not on winnings or players), and includes various ancillary provisions.

The Tenth Circuit characterized Section 2719(d)'s reference to Chapter 35 as "somewhat cryptic," because that Chapter bears no obvious relation to the reporting and withholding of taxes on wagering winnings—the domain to which Section 2719(d)'s operative text applies. Pet. App. 25a. The Court of Appeals for the Federal Circuit considered the reference "ambiguous" for the same reason. *Little Six*, 210 F.3d at 1365. We agree that "Chapter 35" is not a particularly apt example to use to illustrate the scope of the operative text.

The Tenth Circuit suggested that the illustrative reference to Chapter 35 could be harmonized with the operative text by noting that Chapter 35 includes definitions of the terms "wager" and "lottery." Pet. App. 25a. Although those definitions by their terms apply only "[f]or purposes of" Chapter 35 itself, see 26 U.S.C. 4421, they could perhaps be instructive in the interpretation of the Code's separate provisions dealing with gaming winnings—at least to the extent of ensuring that all forms of wagers and lotteries that fall

within the Chapter 35 definitions would also fall within the scope of the "gaming and wagering operations" to which Section 2719(d) refers, and from which winnings are to be reported and withheld under the more directly pertinent provisions of the Code.

Even apart from the court of appeals' suggested explanation of the illustrative reference to Chapter 35, that reference would not necessarily (or properly) be read to confer an exemption from federal excise taxes, as petitioners contend, merely because Chapter 35 contains a single provision conferring such an exemption on state lotteries. See I.R.C. § 4402(3). Nothing in the text of Section 2719(d) suggests that the reference was intended to invoke that exemption, rather than other provisions in Chapter 35 that deal with matters of tax administration, more akin to the "reporting and withholding" concerns with which Section 2719(d) expressly deals. See I.R.C. §§ 4403 (requiring persons liable for excise tax to keep daily records of gross amount of wagers), 4412 (requiring registration of persons subject to occupational tax).

Finally, even if Section 2719(d)'s reference to Chapter 35 of the Code simply could not be harmonized with the IGRA provision's operative language concerning the withholding and reporting of taxes on winnings, that circumstance would not justify reading the IGRA to create a federal tax exemption. While it is certainly preferable to give meaning to each word in a statute, see, *e.g.*, *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990), the text at issue here is merely one of a series of unexplained cross-references in an illustrative parenthetical. It cannot fairly be said to contradict limitations that inhere in the provision's central textual command. If a substantive statutory command and a parenthetical example are truly incon-

sistent, it is hard to imagine circumstances under which the command rather than the example should give way. Cf. *United States* v. *Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999) ("[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the statute") (quoting *Cabell Huntington Hosp., Inc.* v. *Shalala*, 101 F.3d 984, 990 (4th Cir. 1996)), cert. denied, 528 U.S. 1194 (2000). Certainly there are no such circumstances here. See *Little Six, Inc.* v. *United States*, 229 F.3d 1383, 1385 (Fed. Cir. 2000) (Dyk, J., dissenting from denial of rehearing en banc) ("It is far easier to make sense out of [Section 2719(d)] if the inconsistent specific examples are read out of the statute because they conflict with the limitation.").

To the contrary, it would be particularly inappropriate to allow Section 2719(d)'s passing reference to Chapter 35 to supersede its central limitation. What petitioners seek is not some marginal reduction in the applicability of the wagering-tax administrative requirements addressed by the IGRA, but a complete exemption from two entirely different federal excise taxes on petitioners' own gaming businesses. Courts are not free to infer federal tax exemptions: Congress must expressly grant them. See p. 24, *infra*. Whatever else may be said about Section 2719(d), it does not expressly grant petitioners, or other Indian Tribes, any exemption from the excise taxes imposed on their gaming businesses by Chapter 35.

B. The Legislative History Confirms That The IGRA Does Not Grant Tribes An Excise Tax Exemption

The history of Section 2719(d) confirms that conclusion. As originally proposed in the Senate, the bill

that became the IGRA included language that would indeed have exempted tribes from the federal wagering excise taxes:

> Provisions of the Internal Revenue Code of 1986, concerning *the taxation and* the reporting and withholding of taxes with respect to *gambling or wagering operations* shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, 100th Cong., 1st Sess. 37 (1987) (emphasis added). That language, however, was never enacted. The Senate Indian Affairs Committee instead made two critical changes, which are reflected in the language of the final Act: It deleted any reference to provisions "concerning the *taxation* * * * [of] wagering operations," and it added language specifically restricting the provision's scope so that Tribes would be treated as States only for purposes of Internal Revenue Code provisions "concerning the *reporting and withholding* of taxes with respect to *the winnings from* gaming or wagering operations." 25 U.S.C. 2719(d)(1) (emphasis added). It also added the illustrative parenthetical on which petitioners rely.

The Senate Report on the IGRA indicates simply that the provision "applies the Internal Revenue Code to *winnings from* Indian gaming operations"—a statement fully consistent with the enacted language. S. Rep. No. 446, 100th Cong., 2d Sess. 20 (1988) (emphasis added). It does not further explain the drafting changes. One might speculate that the Indian Affairs Committee could have deleted language that would have had the effect of conferring a tax exemption in order to avoid a possible jurisdictional conflict with the Finance Committee, or perhaps even with the House of

Representatives. Cf. *Armstrong* v. *United States*, 759 F.2d 1378, 1381-1382 (9th Cir. 1985) (bills reducing or increasing taxes must originate in the House); *Little Six*, 229 F.3d at 1385 (Dyk, J., dissenting from denial of rehearing en banc) (reciting history showing that precursor legislation, including an express exemption, originated in the House, while the bill that was ultimately enacted, in the next Congress, originated in the Senate). It is also possible that the particular seeming anomaly at issue here, the inclusion of Chapter 35 in the exemplary parenthetical, is simply an inadvertent vestige of some interim version of the bill, created during the committee's internal deliberations (but never published), that included both the examples and the express tax exemption. See *ibid.* ("The language of the provision has all the earmarks of a simple mistake in legislative drafting. The better explanation * * * is * * * that it was included inadvertently after Congress had decided to eliminate the reference to 'taxation.'").

Such speculation is not a firm basis for statutory interpretation. Here, only one confident conclusion can be drawn from the history of Section 2719(d): Deletion of the express exemption language from the original draft bill is strong evidence of Congress's intention not to allow such an exemption. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 (1973) (noting that tax immunity provisions were dropped from bills before enactment of Indian Reorganization Act, 25 U.S.C. 461 *et seq.*). Certainly nothing in the Senate report, let alone in the enacted statutory language, suggests that the new, parenthetical language that emerged from the committee was intended to contradict, rather than to exemplify, the newly limited operative language—by providing Tribes with a shorthand version of the expressly exemptive language that the drafters had just considered and deleted.[5]

C. The Policy Of Encouraging Tribal Economic Development Does Not Permit Courts To Construe The IGRA To Confer A Tax Exemption That Congress Did Not Grant

Finally, the purposes and policies of the IGRA do not justify an inference of congressional intent to create a new excise tax exemption for Tribes, outside the Internal Revenue Code—certainly not in a parenthetical list of examples for a very different substantive proposition, and without any substantive discussion in the

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[5] Petitioners seek to rely (Br. 39-40) on a letter sent to the Commissioner of Internal Revenue in 1991, three years after enactment of the IGRA, in which Senator Inouye, then Chairman of the Indian Affairs Committee, sought to "advise" the Commissioner "that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35." See Pet. App. 113a. In this case that "advi[ce]" is entitled to even less weight than might normally be accorded to a post-enactment statement by a single legislator (if that is possible), because it rests on a materially incorrect statement of the statutory language that it purports to explain. If Congress had enacted the language quoted in the Senator's letter (*ibid.*)—"[t]he provisions of the Internal Revenue Code of 1986 (including . . . chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act . . . in the same manner as such provisions apply to State gaming and wagering operations"—this would be a very different case. That is not, however, the enacted language of Section 2719(d), and it never has been. Whatever its worth in other circumstances, therefore, the Senator's letter is of no value as an aid to construction of the actual statutory language.

legislative history. In *Little Six*, the Federal Circuit relied too heavily on the statutory policy of fostering tribal economic development and self-sufficiency in concluding that it should read Section 2719(d) to require treating Tribes as States for purposes of the excise tax exemption. Pet. App. 110a-111a. Although that goal is surely important, and is set out as a primary general purpose of the IGRA, see 25 U.S.C. 2702(1), it does not sweep all before it.[6] To the contrary, "[i]f federal courts were free to create federal tax exemptions for Indians based on policy alone, the federal policy of Indian economic advancement, implicit in almost all of the many federal enactments regarding Indians, would soon have the unintended effect of exempting all Indians from all federal taxation." *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); see also *Little Six*, 229 F.3d at 1385-1386 (Dyk, J., dissenting from denial of rehearing en banc) ("The fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes.").

Congress can pass (indeed, has passed) legislation that seeks to encourage tribal economic development without exempting Tribes from all federal taxes, or always treating Tribes in the same way that it treats

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[6] Nor is it the only purpose that motivates the IGRA. As the Act itself makes clear, Congress was also concerned to provide a federal statutory framework for the regulation of tribal gaming enterprises, to combat organized crime, to ensure that gaming benefits flowed primarily to Tribes, and "to assure that gaming is conducted fairly and honestly by both the operator and players." See 25 U.S.C. 2702(2)-(3); *Shakopee Mdewakanton Sioux Cmty.* v. *Hope*, 16 F.3d 261, 265 (8th Cir. 1994); S. Rep. No. 446, *supra*, at 1-4.

States. As noted above, Congress has provided targeted tax support for tribal development through Section 7871 of the Internal Revenue Code, which was added by the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202(a), 96 Stat. 2608. See also S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982) (Act was intended to "facilitate [the] efforts of the Indian tribal governments" to "assist their people by stimulating their tribal economies and by providing governmental services."). Section 7871 grants Tribes the benefit of, among other things, some of the excise tax exemptions enjoyed by States—but only with respect to certain taxes, and only to the extent that a particular transaction "involves the exercise of an essential governmental function of the Indian tribal government." 26 U.S.C. 7871(a)(2) and (b) (set out at App., *infra*, 1a-4a); see S. Rep. No. 646, *supra*, at 11-13. The taxes subject to express exemption under Section 7871 do not include the gaming excise taxes. See 26 U.S.C. 7871(a)(2); Rev. Rul. 94-81, 1994-2 C.B. 412. Nor does the Code extend to Tribes the express exemption from the gaming taxes that Section 4402(3) accords to state-run "sweepstakes, wagering pool[s], or lotter[ies.]"

If, at the time it enacted the IGRA, Congress had wished to extend that exemption to Tribes, it could easily have availed itself of either of these existing frameworks within the Code. As it stands, however, both before and after the IGRA, Section 4402 provides an express exemption from the gaming taxes, but not to Tribes; and Section 7871 treats Tribes as States for purposes of express exemption from various excise taxes, but not the gaming taxes. Against that background, Section 20(d) of the IGRA, 25 U.S.C. 2719(d), cannot plausibly be construed to pursue general policies

of tribal development by conferring a federal excise tax exemption on Tribes, through a "cryptic" cross-reference (see Pet. App. 25a) in a parenthetical that in terms merely illustrates an operative provision that deals with distinctly different subject matter.

D. The Canon That Ambiguities Should Be Resolved In Favor Of Indian Interests Does Not Call For A Different Result In This Case

Recognizing that the statutory basis for their claim to a tax exemption is doubtful at best, petitioners rest their case squarely on the proposition that "ambiguity in an Indian-law-related federal statute is to be liberally construed in favor of tribal interests." Pet. Br. 12 (capitalization and emphasis omitted). While we agree with petitioners that that canon of construction is "eminently sound and vital" (Br. 34) where it properly applies, in this case petitioners seek to "place[] more weight on the canon * * * than [it] can bear." *Little Six*, 229 F.3d at 1386 (Dyk, J., dissenting from denial of rehearing en banc).[7]

The principle of resolving ambiguity in favor of Indian interests has its origin and core application in cases involving the interpretation or abrogation of Indian treaties or treaty rights. See, *e.g.*, *County of Oneida, New York* v. *Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985); *Jones* v. *Meehan*, 175 U.S. 1, 11-12 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28 (1886). The canon extends as well to the interpretation of federal enactments pertaining to Indian Tribes, see *County of Yakima* v. *Confederated Tribes & Bands*

[7] Indeed, for reasons we have explained, the parenthetical reference to Chapter 35 on which petitioners rely is perhaps more accurately described as a "mystery" rather than an "ambiguity."

of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), and this Court has invoked it in considering whether general language in an Indian statute sufficed to exempt from federal tax certain otherwise taxable income that had been derived from Indian trust lands. *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956).[8] If Section 2719(d) were genuinely susceptible of the construction that petitioners seek to place on it, it might be appropriate for the Court to take into account this principle of generous construction.

But even if it applied, the Indian canon would not simply dictate resolution of the case in petitioners' favor, as petitioners seem to suggest (Br. 21-27). "Canons of construction need not be conclusive and are often countered, of course, by some [other] maxim

[8] In *Squire*, the Court analyzed the structure and purposes of the Indian General Allotment Act; a proviso in the 1906 amendment to the Act; legislative history; and a series of "relatively contemporaneous official and unofficial writings," and concluded that Congress intended to exempt certain Indians from tax on gains from the sale of timber from a restricted allotment (*i.e.*, land allotted to an Indian, title to which was held in trust by the United States for a specified period, during which the land was subject to restrictions on alienation and encumbrance). The Court reasoned that the language of the original Act might be ambiguous on the point, but that the import of the "literal language" of the 1906 proviso "evince[d] a congressional intent" that the income would not be taxable until the government removed the restrictions from the land. 351 U.S. at 6-9. *Squire* reflects the proper practice of using traditional tools of statutory construction to reach a result consistent with congressional intent, rather than relying reflexively on any particular canon of construction. See also *Mescalero*, 411 U.S. at 156 (citing *Squire* as support for the proposition that "tax exemptions are not granted by implication," a rule applied "to taxing acts affecting Indians as to all others," and that an exemption "cannot rest on dubious inferences") (quoting *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606-607 (1943)).

pointing in a different direction." *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1309 (2001). Here, the Court would, at a minimum, have to balance the Indian canon against the countervailing principle, also recognized in *Squire*, that exemptions from federal taxation must be expressly stated, and may not simply be inferred by the courts from unclear statutory language. See *Squire*, 351 U.S. at 6 ("We also agree that, to be valid, exemptions to tax laws should be clearly expressed."). That principle has long been a touchstone of federal tax law, and it is as venerable in that critically important sphere as the Indian canon is in the realm of Indian law. See, *e.g.*, *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354-355 (1988); *United States Trust Co. of New York* v. *Helvering*, 307 U.S. 57, 60 (1939). Indeed, this Court has long disfavored implied exemptions in cases involving both income and excise taxation of Indians. See *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 421 (1935) (no exemption for surplus income from allotted land, where no law "expresses definite intent to exclude [it] from taxation"); *Choteau* v. *Burnet*, 283 U.S. 691, 693-694, 696-697 (1931) (Indian who had received federal "certificate of competency" was thenceforth liable for federal income tax in the absence of any express statutory exemption; "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter."); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 618, 620 (1870) (federal excise tax on tobacco "within the exterior boundaries of the United States" applied to Indians within the territory of the Cherokee Nation; language was broad enough to encompass Indians, and any intended exemption "would doubtless have been expressed").

Petitioners seek (Br. 15-21) to counter reliance on the anti-exemption principle by quoting this Court's statement that that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 n.4 (1985) (quoting *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912)). The citation is inapt, however, because *Montana*, *Choate*, and the other cases on which petitioners rely (with the exception of *Squire*, discussed above) all involved the very different context of *state* taxation of Indians or Tribes.[9] In that context, this Court, cognizant of "the unique trust relationship between the United States and the Indians," *County of Oneida*, 470 U.S. at 247, has made clear that "first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; [and] second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766 (citation omitted); see also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 455, 458 (1995).

The situation is very different, however, in federal taxation cases such as this one. Unlike state governments, Congress has plenary authority to legislate over Indian affairs, and that authority unquestionably includes the power to impose federal taxes. See *Choteau*,

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[9] In *Choate*, moreover, unlike in this case, there was no dispute that the relevant statute contained an express exemption. The issue was whether that exemption conferred a property right protected by the Fifth Amendment. 225 U.S. at 671; see also *Carpenter* v. *Shaw*, 280 U.S. 363 (1930).

283 U.S. at 697.[10] Historically, moreover, the Tribes' legal and practical relationship to the federal government has been entirely different from their relationship to the governments of the States. See, *e.g.*, *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.") (quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945)). The Court has frequently relied on the unique nature of that relationship to require clear congressional consent to state taxation, as well as clear expression of congressional intent to abrogate Indian treaty rights.[11] The Court has not, however, required that Congress speak with the same clarity in order to bring Indians or Tribes within the coverage of general federal tax laws. See *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (rejecting rule in *Chouteau* v. *Commissioner*, 38 F.2d 976, 977 (10th Cir.), cert. denied, 281 U.S. 759 (1930), that federal income tax laws must manifest a specific intent to apply to Indians). To the contrary, where a federal tax statute is broad enough to cover the subject matter, any exemption for Indians "must be definitely expressed."

[10] As to Congress's plenary authority, see, *e.g.*, U.S. Const. Art. I, § 8, Cl. 3; *id.* Art. II, § 2, Cl. 2; *Montana*, 471 U.S. at 764-765; *County of Oneida*, 470 U.S. at 234; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974).

[11] See, *e.g.*, *County of Oneida*, 470 U.S. at 247 (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979)); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (diminishment of reservation boundaries); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (extinction of land title).

Superintendent of Five Civilized Tribes, 295 U.S. at 419-420 (quoting *Choteau*, 283 U.S. at 696-697); see also *Squire*, 351 U.S. at 6; *The Cherokee Tobacco*, 78 U.S. (11 Wall.) at 620.

In any event, this case does not resolve itself into a duel between competing canons of statutory construction—that favoring Indians, on the one hand, and that disfavoring implied tax exemptions, on the other. Such special canons are properly applied only after, or at least alongside, the central traditional tools of statutory interpretation (themselves the primary "canons"): close examination of the statute's language, history, and motivating purposes or legal context. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).[12] In this case, although there is doubt concerning exactly how Section 2719(d)'s reference to Chapter 35 may be given effect as an example of a provision "concerning the reporting and withholding of taxes with respect to [players'] winnings" from tribal gaming operations, there is no doubt that the latter operative language cannot properly be construed to confer on Tribes an exemption from their own federal excise taxes. See pp. 12-22, *supra*. Thus, application of

[12] See also, *e.g.*, Pet. Br. 15 n.5 (quoting *Citizens' Bank* v. *Parker*, 192 U.S. 73, 85-86 (1904)); cf. *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 911 (2001) (doctrine of constitutional doubt); *Lindh* v. *Murphy*, 521 U.S. 320, 324-326 (1997) (presumption against retroactivity); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) (rule of lenity); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (deference to administrative interpretation).

the basic tools of interpretation leaves no remaining scope for petitioners' reliance on the Indian canon.[13]

Although special canons of construction are often useful tools, like other such tools they are properly used to help resolve genuine interpretive ambiguity, not to create doubt about an interpretation where none would otherwise exist. See *Connecticut Nat'l Bank*, 503 U.S. at 253-254; cf. *Ratzlaf*, 510 U.S. at 147-148 ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). The Indian canon cannot justify interpretation of Section 2719(d) in a manner that cannot be reconciled with its language and history—the most basic tools of interpretation, and the best indicators of congressional intent. See, *e.g.*, *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 & n.16 (1986) (canon "does not permit reliance on ambiguities that do not exist"); *DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975); *Hagen*, 510 U.S. at 411-412, 421; *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-178 (1989); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Rice* v. *Rehner*, 463 U.S. 713, 732-733 (1983). Accordingly, the court of appeals correctly held in this case that Sections 4401 and 4411 of the Internal Revenue Code apply to

[13] Moreover, the same considerations that make it unnecessary to resolve this case as a contest between dueling canons of construction also indicate that, if a court were to reach the question, the canon disfavoring implied tax exemptions would prevail over the Indian canon under the particular circumstances of this case. Indeed, petitioners scarcely contest that the government has much the better of the statutory argument using the primary tools of construction. See Pet. Br. 29 n.16 ("Here, the face of the statute and the legislative history do not clearly demonstrate that the construction of § 2719(d)(1) proffered by the Petitioner Nations is incorrect.").

petitioners' gaming operations, and that petitioners enjoy no exemption from the federal excise taxes so imposed.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 7871 of the Internal Revenue Code of 1986, 26 U.S.C. 7871, as added by the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, Tit. II, 96 Stat. 2607, and subsequently amended, provides in part as follows:

§ 7871. Indian tribal governments treated as States for certain purposes

(a) General rule.—

An Indian tribal government shall be treated as a State—

(1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under—

(A) section 170 (relating to income tax deduction for charitable, etc., contributions and gifts),

(B) sections 2055 and 2106(a)(2) (relating to estate tax deduction for transfers of public, charitable, and religious uses), or

(C) section 2522 (relating to gift tax deduction for charitable and similar gifts);

(2) subject to subsection (b), for purposes of any exemption from, credit or refund of, or

payment with respect to, an excise tax imposed by—

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufacturers excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax), or

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles);

(3) for purposes of section 164 (relating to deduction for taxes);

(4) subject to subsection (c), for purposes of section 103 (relating to State and local bonds);

(5) for purposes of section 511(a)(2)(B) (relating to the taxation of colleges and universities which are agencies or instrumentalities of governments or their political subdivisions);

(6) for purposes of—

(A) section 105(e) (relating to accident and health plans),

(B) section 403(b)(1)(A)(ii) (relating to the taxation of contributions of certain employers for employee annuities), and

(C) section 454(b)(2) (relating to discount obligations); and

(7) for purposes of—

(A) chapter 41 (relating to tax on excess expenditures to influence legislation), and

(B) subchapter A of chapter 42 (relating to private foundations).

(b) Additional requirements for excise tax exemptions

Paragraph (2) of subsection (a) shall apply with respect to any transaction only if, in addition to any other require-ment of this title applicable to similar transactions involving a State or political subdivision thereof, the transaction in-volves the exercise of an essential governmental function of the Indian tribal government.

* * * * *

(d) Treatment of subdivisions of Indian tribal governments as political subdivisions

For the purposes specified in subsection (a), a sub-division of an Indian tribal government shall be treated as a political subdivision of a State if (and only if) the Secretary determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial

governmental functions of the Indian tribal government.

(e) Essential governmental function

For purposes of this section, the term "essential governmental function" shall not include any function which is not customarily performed by State and local governments with general taxing powers.